QUESTIONS PRESENTED

I. Did the Court of Appeals err in affirming the District Court's refusal to set aside a verdict where there was no genuine issue of fact concerning Respondent's malpractice for failing to communicate its concerns for Petitioner with a responsible person?

II. Did the Court of Appeals err in affirming the District Court's denial of Petitioner's request for new trial where the charge did not properly set forth the failure to communicate and the District Court allowed in evidence and argument concerning a similar incident?

III. Did the Court of Appeals err and depart from the decisions of the other United States Circuit Courts of Appeals in refusing to even review whether it was an abuse of discretion of the District Court not to consider a request for a new trial based on the overwhelming weight of the evidence that Respondent failed to communicate?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Eric Krivanek and Respondent Mad River Valley Health Center, Inc. (Health Center). Respondent Health Center has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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No. _____

In The

Supreme Court of the United States

October Term, 1988

ERIC KRIVANEK

Petitioner,

v.

MAD RIVER VALLEY HEALTH CENTER, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT UNITED STATES COURT OF APPEALS

Petitioner Eric Krivanek respectfully requests that a writ of certiorari issue to review the October 13, 1988, Order of the Second Circuit United States Court of Appeals affirming judgment for Respondent and its December 12, 1988, Orders denying Petitioner's request for rehearing and amending its initial order.

OPINIONS BELOW

The opinion and orders dated October 13, 1988, and December 12, 1988, of the Second Circuit Court of

Appeals are not reported but are reprinted in the appendix hereto, p. 1A, *infra*. The March 16, 1988, Order of Judge Billings of the United States District Court for the District of Vermont has not been reported but is reprinted in the appendix hereto p. 8A, *infra*. The judgment on the verdict is reprinted in the appendix hereto at p. 10A, *infra*.

JURISDICTION

This action was originally commenced by the Petitioner in the United States District Court for the District of Vermont. This is a diversity action for malpractice for Health Center's failure to diagnose, treat and monitor Petitioner for meningitis and for its failure to communicate its concerns for Petitioner to his parents or his school. The case was tried before United States District Court Judge Franklin S. Billings in February, 1988.

After a jury trial a verdict was returned for Respondent and judgment entered on the verdict. Petitioner moved for judgment notwithstanding the verdict or in the alternative a new trial. Judge Billings denied both motions and petitioner appealed from these denials to the Second Circuit Court of Appeals. The Second Circuit affirmed the judgment of the District Court on October 13, 1988.

Petitioner moved for a rehearing which was denied by the Second Circuit on December 12, 1988. The Second Circuit, however, slightly amended its Order on December 12, 1988. These orders were issued as mandate on December 28, 1988. (Appendix p. 1A.) The jurisdiction of

this Court to review the Orders of the Second Circuit is invoked under 28 U.S.C. § 1257 (1).

STATEMENT OF THE CASE

1. History

Petitioner was a senior boarding student at a small private ski academy in Waitsfield, Vermont, known as the Green Mountain Valley School (School). He was a resident of San Diego, California, and a minor in January of 1986. Respondent was the health provider for the School's students and Petitioner was one of its patients.

In the evening on January 26, 1988, Petitioner became ill and suffered from vomiting and an intense headache. Petitioner was taken to see Dr. Timothy Wargo at the Health Center in Waitsfield, Vermont, on January 27, 1986. Petitioner appeared feverish and anxious and he complained of vomiting, an intense headache and back pain. Petitioner gave Dr. Wargo and his medical assistant two different histories for his back pain. Dr. Wargo suspected meningitis and examined Petitioner's neck twice and found that the neck was mildly stiff. However, Dr. Wargo did not know that mild stiffness of the neck was a developing sign of nuchal rigidity or boardlike stiffness of the back and neck.

Dr. Wargo attributed the back pain to bed rest and the neck stiffness to a tension headache and flu. He gave Petitioner Tylenol and a shot of a sedative and told him to return to the Health Center if he was no better. While Dr. Wargo was concerned that Petitioner might be developing meningitis or Reyes Syndrome, he did not contact

either Petitioner's parents or the School to communicate his concern for Petitioner or that they should return him to the Health Center if he was no better. Dr. Wargo did not even determine what Petitioner's living stiuation was before discharging him and also did not determine if anyone would be caring for him despite his concern that Petitioner might get worse.

Petitioner returned to School which had no nurse and, over the course of two days, became dramatically worse. Had Dr. Wargo known that Petitioner was no better the next day, he would have performed a lumbar puncture which is the definitive test for meningitis. If a lumbar puncture had been performed on January 28, 1986, it would have diagnosed Petitioner for meningitis and Petitioner would have had a complete cure.

Petitioner was returned to Health Center on January 29, 1986, in critical condition and was rushed to the Medical Center at the University of Vermont. There a lumbar puncture was performed and Petitioner was diagnosed and treated for a severe case of pneumococcal meningitis and placed in intensive care.

Petitioner was hospitalized for three months and spent three months in outpatient rehabilitation. As a result of his illness, Petitioner suffered brain damage, loss of co-ordination, loss of hearing in his left ear, loss of smell and a painful stroke-like contracture of the right arm and hand. Currently, he is fifty percent permanently disabled both mentally and physically.

Pneumococcal meningitis is a bacterial infection of meninges, the outer lining of the brain and spinal cord. The primary signs and symptoms of meningitis are fever,

vomiting, headache and a stiff neck or back due to the inflammation of the meninges. Secondary signs and symptoms are confusion, stupor, disorientation, or focal changes.

The only reliable diagnostic test to determine if meningitis is present or not is a lumbar puncture or spinal tap to check the presence of bacteria or viruses in the spinal fluid. This test should be performed when the primary signs and symptoms are present.

Pneumococcal meningitis is considered a life threatening, major medical emergency and its early treatment with large doses of antibiotics is greatly recommended by the medical profession. It is an axiom of the medical profession that: "If meningitis is suggested, . . . good judgment requires too many, rather than too few, lumbar punctures be done." The morbidity of pneumococcal meningitis and its disabling effects can be greatly reduced by early detection and treatment.

2. Standard of Care

Petitioner instituted suit against Health Center claiming that as a result of its failure to earlier diagnose his illness and its failure to properly monitor and treat him during his illness that his condition became much worse than it otherwise would have been. Petitioner also maintained that Dr. Wargo was negligent in failing to communicate his concerns for Petitioner to a responsible person at the School or his parents and in failing to perform a lumbar puncture.

Respondent Health Center claimed that Petitioner was not diplaying nuchal rigidity of the neck, *i.e.*,

boardlike stiffness, and that its physician, in not diagnosing pneumococcal meningitis on January 27, 1986, was not performing below customary medical standards. It further maintained that it was appropriate to return Petitioner to School without any special instructions or supervision.

The uncontroverted expert testimony at trial concerning the ordinary and customary care and treatment of patients suspected of having meningitis is that a lumbar puncture should be performed so that early treatment can be started. Meningitis should be suspected in patients, such as Petitioner, with fever, vomiting, intense headache and back pain coupled with either stiffness of the neck or confusion. All the experts agreed that even where the concern for meningitis does not reach the degree of suspicion necessary to perform a lumbar puncture, a reasonably prudent physician should at least assure that someone is keeping an eye on the patient to note any changes for the physician.

All of the experts unanimously agreed that given even a minuscule concern for meningitis, the duty of the physician to monitor and care for the patient should continue. The reason there is a need for continuing care is that the patient may become confused, not recognize it and therefore would not know to return to the physician as was the case with Petitioner.

Therefore, all experts agreed that the physician has a duty to know of his patient's living situation and to assure that a responsible person is caring for the patient. The responsible person should be instructed to look for signs of confusion such as irrational behavior or decreased alertness, like constant sleeping or drowsiness,

all of which Petitioner displayed on Tuesday, January 28, 1986. Dr. Wargo testified Respondent had a policy with juveniles or patients who he suspected might get worse of contacting a responsible person about treatment and care; however, in Petitioner's case, he did not contact anyone despite the fact he was still concerned about the possibility of meningitis or Reyes Syndrome after his initial examination of Petitioner.

Finally, the experts agreed that on engaging in differential diagnosis, a physician should always treat the patient for the most problematic diagnosis or the one that is going to have the most acute effect. Differential diagnosis and care and treatment should continue until all suspected diagnoses are absolutely ruled out. Respondent's experts testified that on Monday, January 27, 1986, based on the medical record, meningitis could not be ruled in or out without a lumbar puncture. They testified that if they had even a minuscule thought there might be meningitis, their relationship with the patient would continue.

The evidence showed that Dr. Wargo was clearly mistaken in a number of respects, such as, by failing to recognize that a mild stiff neck may be the start of nuchal rigidity; by failing to obtain an accurate history; by failing to determine Petitioner's living situation; by never performing a lumbar puncture; and, especially by failing to communicate with Petitioner's parents or a responsible person at School about Petitioner's care and treatment.

3. Similar Incident

At trial, over the objection of Petitioner's counsel, evidence was admitted referencing a meningitis incident

involving a University of Vermont ("UVM") student who was seen in the Emergency Room at the Medical Center and who died two days later. The evidence came in during the cross-examination of Petitioner's infectious disease expert, Dr. Dieter W. Gump, who was a Professor of Medicine at the University of Vermont Medical School. This evidence was without any probative value in the instant action since no specifics were introduced regarding the presenting signs and symptoms of the UVM student admitted to the Emergency Room and no documents or other evidence were introduced to demonstrate any basis for a parallel between the incident involving the UVM student and the Petitioner in this action.

Also, over Petitioner's objection, a parallel was suggested by Respondent's counsel in closing argument, when he suggested to the jury that they should not fault the Respondent for misdiagnosing Petitioner and twice referred to the UVM sophomore treated at the Emergency Room at the Medical Center, who passed away two days later. Although not all the facts were known, nor were even those facts that were suggested by counsel about the other incident properly introduced into evidence or admitted for any probative value, the clear implication in the argument to the jury was that they should view the fact that the student was sent home after being examined at the Emergency Room and the fact that the student died two days later, as dispositive of the standard of care in *this* case, where Dr. Wargo examined Petitioner, sent him home and he nearly died two days later when he was rushed to the Medical Center for treatment of his disease.

During the argument by Respondent's counsel, when reference was made to the incident, an objection was

taken by Petitioner's counsel. At the conclusion of the Court's charge, an objection was also taken at the bench by Petitioner's counsel to the highly prejudicial effect of this part of Respondent's counsel's argument. Petitioner requested a curative instruction from the District Court, but no instruction was given.

In the absence of such an instruction, the jury was permitted to consider the evidence of the UVM incident as a parallel to the instant case, not knowing the result or whether there was any litigation pursued regarding the student's death and not knowing, through any admissible evidence, whether facts alleged by counsel in the questions of witnesses during the trial of this case, and the facts claimed by counsel during his argument were true. Indeed, the jury in this case did not have the benefit of any admissible evidence upon which it could determine that the UVM student incident was a proper parallel as suggested.

4. Charge to the Jury

Also at trial Petitioner made separate and distinct claims of negligence aganst defendant for which recovery for damages was sought. The claims included the failure to diagnose, failure to do a spinal tap, failure to communicate with the school to provide instructions for follow-up monitoring and care, and the failure to diagnose on Tuesday, January 28, 1986.

Petitioner, in his Request for Jury Instructions, requested the Court to instruct the jury that it is not necessary that Petitioner prove Respondent guilty of each separate charge of negligence alleged, but that it would

be sufficient to entitle Petitioner to recover if it was found from a fair preponderance of the evidence, any one of the acts of negligence occurred and that the act was a proximate cause of injury. However, the District Court charged the jury that the Petitioner claimed that " . . . Dr. Wargo negligently failed to diagnose the illness as pneumococcal meningitis *and* to treat it as such *and* to monitor his condition." (Emphasis added.) The District Court further charged the jury that it must resolve the question of whether defendant was negligent because " . . . it breached a duty owed to the Plaintiff to properly diagnose, treat *and* monitor Plaintiff's illness." (Emphasis added.)

The District Court's final charge on negligence reads:

> In deciding whether the medical clinic was or was not negligent, you may consider whether, in failing to diagnose *and* treat the plaintiff's illness as meningitis *the first time he examined* him *and* in failing to monitor his condition, Dr. Wargo failed to exercise the degree of care ordinarily exercised by a reasonably skillful, careful, and prudent physician. (Emphasis added.)

The Court therefore in effect charged the jury that to prove his claim for medical malpractice, Petitioner had to prove all of his claims of negligence. After the charge was given, Petitioner objected to the charge of negligence but the Court denied the objection.

The Court never charged the jury as it should have that it was not necessary that Petitioner prove the Respondent guilty of each separate charge of negligence alleged in the complaint or that it would be sufficient to entitle Petitioner to recover if they found the Respondent was guilty of any one of the claims of negligence.

After deliberating all morning, after lunch the jury returned to the Court before the conclusion of their deliberations with a question that was understood to include a request that the Court re-read the part of its charge regarding burden of proof. The Court re-read its charge concerning burden of proof and the foreman of the jury requested that the portion pertaining to preponderance of the evidence be read again and it was. Shortly after reading these instructions, the jury returned a verdict for Respondent and the Court entered judgment on the verdict. Petitioner moved for judgment notwithstanding the verdict and in the alternative for a new trial, both of which the Court denied.

5. Appeal

Petitioner appealed to the Second Circuit claiming the District Court erred in denying both his motions for a directed verdict and new trial since the uncontroverted evidence of the Respondent's failure to communicate was overwhelmingly in Petitioner's favor and since the evidence of the similar incident and the charge were highly prejudicial to Petitioner's case. The Second Circuit, however, affirmed the judgment stating that the " . . . evidence was conflicting as to whether Dr. Wargo's *failure to diagnose* meningitis based on the symptoms exhibited by the plaintiff *on January 27* fell below the standard of due care." (Emphasis added.) Appendix p. 2A. The Second Circuit went on to find, that despite the trial court's usage of he conjunction "and" in its charge, that the charge " . . . did not require the jury to find that defendant was negligent in all of the respects alleged . . . " *Id.* The Second Circuit also found it was not error to allow in

evidence and argument concerning the similar incident of which Petitioner's expert knew nothing. Finally, the Second Circuit found that Petitioner's contention that the trial court abused its discretion in denying Petitioner's motion for a new trial based on the weight of the evidence " . . . is not available for review in this Court . . . " Appendix p. 2A.

Petitioner is now petitioning the United States Supreme Court for a Writ of Certiorari to the Second Circuit since the Second Circuit has overlooked or misapprehended Petitioner's claims and has refused to review Petitioner's claim that Judge Billings abused his discretion whereas the other United States Circuit Courts of Appeals do review this question.

REASONS FOR GRANTING THE WRIT

I.

The Second Circuit Erred In Affirming The District Court's Denial Of Petitioner's Motion For Judgment Notwithstanding The Verdict Since There Was No Genuine Issue Of Fact That Respondent Failed To Communicate With A Responsible Person.

In the present case there was no genuine issue of fact that a lumbar puncture should have been performed on January 28, 1986, and that it would have diagnosed Petitioner as having meningitis. If the diagnosis had been made, it is clear that Petitioner would have received earlier treatment and would have had a shorter hospital stay and a full recovery. (See Reason III., *infra.*) However, the District Court denied Petitioner's motion for directed verdict and the Second Circuit affirmed.

This case is very similar to the case of *Arvayo v. United States*, 580 F.Supp. 753 (1984) *rev'd on other grounds* 766 F. 2d 1416 (10th Cir. 1985). In the *Arvayo* case the District Court found a United States doctor liable for failing to diagnose an infant as having bacterial meningitis which resulted in brain damage. There the Court held that the doctor negligently failed to diagnose meningitis when the infant was merely feverish and irritable. The Court found the diagnosis could have been easily made with a lumbar puncture. While the Court noted the doctor was not an insurer, the Court stated:

> In this, from the outset the Court, as a layman in every respect, is reminded of the horrible consequences of this disease. It must follow that the physician, (not the complaining and unknowing parents) certainly must have an appreciation of the ever threatening circumstances ingrained into them through their training and experience. This teaching is to be to such an extent the physician will never forget it nor lose sight of the necessity to rule out its likehood. However veiled the symptoms may be, the physician is reasonably required to be satisfied, given any signal, that he had indeed explored and exhausted his search. *Id.*, at p. 758.

In the present case it was clear that Dr. Wargo had signals that Petitioner had meningitis on January 27, 1986, but failed to explore and exhaust his search for it by performing a lumbar puncture. Petitioner had all of the presenting signs and symptoms of meningitis on January 27, 1986, by Dr. Wargo's own admission, *i.e.*, fever, headache, vomiting, back pain and mild stiff neck. Also, Petitioner was confused on January 27, 1986, due to the fact

he gave Dr. Wargo and his medical assistant two conflicting and inconsistent histories and since Petitioner was not answering questions logically.

Dr. Wargo admitted at trial that he did not know that mild stiff neck could be a sign of meningitis. He was not aware that the neck gets more stiff as the disease progresses. Had he known this, he would have performed a lumbar puncture.

Even assuming Dr. Wargo did not have enough signals to perform a lumbar puncture on January 27, 1986, he certainly could not reasonably rule out the likelihood of meningitis without performing a lumbar puncture. Therefore he had a continuing duty to monitor Petitioner's condition or to give Petitioner's School or parents necessary and proper instructions as to the care and treatment of Petitioner and the cautions to be observed for further signs of meningitis. *Christy v. Salterman,* 170 NW 2d 288 (Minn. 1970).

If this had been done, it is clear from the evidence that Dr. Wargo would have known Petitioner was not any better on Tuesday, January 28, 1986, and he would have performed a lumbar puncture. Since Dr. Wargo had the opportunity for knowledge concerning the worsening of Petitioner's condition and such knowledge was required for the proper care and treatment of Petitioner, Dr. Wargo's actual lack of knowledge of Petitioner's condition on January 28, 1986, should provide him no protection from legal liability. *Largess v. Tatem,* 130 Vt. 271 (1972).

While there was some conflicting evidence at trial on the degree of neck stiffness needed to perform a lumbar

puncture on Monday, January 27, 1986, all of the experts agreed that even the slightest suspicion of meningitis in a minor should lead a physician to communicate his concern to a responsible person and that if Dr. Wargo had done so, Petitioner would have been diagnosed and treated for meningitis on Tuesday, January 28, 1986. However, both the District Court and the Second Circuit focused only on the Respondent's diagnosis on Monday and the degree of neck stiffness as opposed to the action which should have been taken after the examination, *i.e.*, communicating with a responsible person to monitor Petitioner's condition. Petitioner respectfully submits that both the District Court and the Second Circuit were mistaken in this regard and erred as a matter of law in not directing a verdict for Petitioner based on Respondent's negligent failure to communicate his concerns to a responsible person.

II.

The Second Circuit Erred In Affirming The District Courts Denial Of A New Trial Since The Charge Did Not Include The Failure To Communicate And The Evidence And Argument Concerning A Similar Incident Was Highly Prejudicial To Petitioner's Case.

With regard to the District Court's charge to the jury, it is clear that the charge limited the jury to only finding negligence on Monday, January 27, 1986, for a misdiagnosis and that the jury also had to find that Respondent had failed to properly monitor Petitioner after Monday. The jury was never charged at all on the duty of a physician to communicate his concerns for meningitis to

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a responsible person. The charge is similar to the charge in *Cann v. Ford Motor Co.*, 658 F. 2d 54 (2nd Cir. 1981) where the Court used the conjunction except there the charge was through interrogatories.

In the *Cann* case, *infra*, the Second Circuit found that the use of the conjunctive word "and" after each alternative claim of negligence created an unfair obstacle to Petitioner in recovering on any of her claims of negligence. *Id.* Here, as in the *Cann* case, the jury would have to find that Respondent was negligent in failing to diagnose *and* treat Petitioner in order to find negligence due to Respondent's failure to monitor Petitioner's condition. More importantly, the Court never charged the jury on the duty of a physician to communicate with a responsible person.

While Petitioner did not specifically object to the use of the conjunction, Petitioner in its requests for jury instructions and its objection to charge made it clear to the District Court that the charge did not go far enough to delineate each of Petitioner's alternative claims of negligence and that liability could rest on any one claim, especially Petitioner's claim of negligence based on Dr. Wargo's failure to communicate his concerns. For instance, Petitioner specifically requested the District Court to charge the jury that

> "If you find that Dr. Wargo released Eric Krivanek on Monday, January 27, 1986, without ascertaining whether Eric would be adequately supervised and without giving instructions to the School that would permit the School, its employees and the students there, to give Eric adequate supervision, then you shall find liability against the Defendant." *Id.; Bateman v. Rosenberg*, (Mo. App.) 525 SW 2d 753.

Petitioner similarly requested the District Court to charge liability for his other claims of negligence. After the charge, Petitioner's counsel had the following dialogue with the Court:

> MR. REIBER: Your Honor, we except that there was nothing specifically about the failure of the clinic and the physician to provide instructions to the school.
>
> THE COURT: We indicated monitor in our opinion.
>
> MR. REIBER: I understand that, your Honor. But we don't believe the charge goes far enough to point out to the jury in specific terms the area of negligence that we think has to do with the failure to provide adequate mon – follow-up care.
>
> THE COURT: Okay.
>
> MR. REIBER: We also would except on the basis that we believe the instructions should be more specific regarding the failure to properly diagnose the disease, in that there was no specific mention of the failure of the physician to do a lumbar puncture.
>
> THE COURT: I never mention the facts of the case in any charge that I give.

From the foregoing, it is clear that Petitioner brought to the District Court's attention its objection that each alternative claim of negligence had not been adequately charged to the jury and that the District Court's charge on diagnosis, care and treatment did not go far enough and was too limited.

However, despite the use of the conjunction and the District Court's refusal to charge the physician's duty to communicate, the Second Circuit held the charge was appropriate and did not require a finding by the jury of

all claims of negligence. This conclusion by the Second Circuit clearly overlooks the fact that Petitioner was entitled to a separate charge on respondent's failure to communicate his concerns to a responsible person which is a separate and distinct charge from monitor.

While the Second Circuit also went on to conclude that allowing in the evidence and argument of the similar incident was not error, it did not state its reasons for this conclusion. Petitioner maintained at trial and on appeal that the evidence and argument about the similar incident was irrelevant and highly prejudicial and therefore should have been excluded under Rule 403 of the Federal rules of Evidence. Petitioner respectfully submits that the Second Circuit's finding of no error in this regard is in direct conflict with the Federal Rules of Evidence and may be in conflict with prior decisions of the United States Supreme Court. *See, Shepard v. United States,* 290 U.S. 96 (1933), *Delaware L. & W.R. Co. v. Converse,* 139 U.S. 469 (1891).

III.

The Refusal Of The Second Circuit To Review Petitioner's Claims That The Trial Court Abused Its Discretion And Failed To Exercise Its Discretion Concerning The Weight Of The Evidence On The Failure To Communicate Is In Conflict With The Other Circuit Courts Of Appeals' Decisions And Erroneous.

The Federal Rules of Civil Procedure permit the District Court to award a new trial upon motion filed within ten days "for any reason for which new trials are granted." Fed. R. Civ. P. 59(a). If a motion is made for

judgment notwithstanding the verdict under Rule 50, a motion for new trial may also be requested. While a motion was made by Petitioner it was denied by the District Court, without any consideration of the weight of the evidence. The Second Circuit refused to even entertain Petitioner's claim of error that the District Court abused its discretion in denying their motion, since the overwhelming weight of the evidence was in Petitioner's favor.

As to the claims of negligence of the defendant, there was no dispute concerning the following facts which were in Petitioner's favor:

1. Dr. Wargo admitted, on cross-examination, that he mistakenly thought board stiffness was necessary to the diagnosis of meningitis.

2. Petitioner had meningitis on Monday, January 27, 1986, the first date on which Dr. Wargo examined Petitioner.

3. Dr. Wargo wanted Petitioner to return to Health Center if no better.

4. Health Center knew that Petitioner was a minor and that the School was relying on the Health Center for its medical treatment and care.

5. Dr. Wargo suspected either meningitis or Reyes Syndrome on January 27, 1986.

6. With a suspicion of meningitis on January 27, 1986, a lumbar puncture should have been performed; or at least the physician-patient relationship should have continued.

7. If a physician had a suspicion of meningitis or Reyes Syndrome, he should have let the parents or the school of the Petitioner know and should have asked them to return Petitioner on Tuesday, if he was no better.

8. If Dr. Wargo knew on Tuesday, January 28, 1986, that Petitioner was no better or confused, he would have wanted to have seen Petitioner.

9. If Petitioner was no better, Dr. Wargo would have performed a spinal tap on Tuesday.

10. A spinal tap would have revealed meningitis on Tuesday.

11. Early treatment would have shortened Petitioner's medical treatment and Petitioner would have recovered with little or no deficit.

The law is clear in the United States that a new trial should be granted where the verdict is against the overwhelming weight of the evidence. *Zegan v. Central R. Co.*, 266 F. 2d 101 (3rd Cir. 1959). Based on the evidence in this case, it is clear that the District Court abused its discretion in not granting a new trial since the verdict was indeed against the clear and overwhelming weight of the evidence.

The trial judge has a duty to check the jury's power to render a binding verdict to avoid a miscarriage of justice where the jury disregards credible evidence and its verdict is against the clear weight thereof, not to do so constitutes an abuse of discretion. *Sandlin v. Pearsall*, 427 F. Supp. 494 (E.D. Tenn. 1976). Since a motion for new trial is different from a directed verdict, the trial court does not necessarily have to view all the evidence in the

winning party's favor since a verdict is not being directed against it. *Quachita Nat. Bank v. Tosco Corp.*, 686 F. 2d 1291 *on reh. en banc* 716 F. 2d 485 (8th Cir. 1982). One Circuit Court has said that the trial court may weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict. *Slatton v. Martin K. Eby Constr. Co., Inc.*, 506 F. 2d 505 (8th Cir. 1974) *cert. den.* 421 U.S. 931 (1975).

In the present case, it appears that Judge Billings never even addressed the issue of whether the verdict was against the weight of the evidence or not. While Judge Billings found that a genuine issue of fact existed, his Order dated March 16, 1988, does not specify the issue and is totally devoid of any consideration of Petitioner's claim that the weight of the evidence in all fairness required a new trial. Since it appears that Judge Billings never even exercised his discretion, it is clear that this in and of itself constituted an abuse of discretion and is reversible error. *See, Lent v. Huntoon*, 143 Vt. 539, 552 (1983). Finally, Judge Billings' refusal to grant a new trial was an abuse of discretion since the refusal allowed a miscarriage of justice due to the undisputed and overwhelming evidence of Dr. Wargo's failure to communicate. However, the Second Circuit refused to even entertain Petitioner's appeal on this issue and affirmed Judge Billings decision without further consideration.

The United States Supreme Court had indicated in *Fairmont Glassworks v. Cub Fork Coal Co.*, 287 U.S. 474 that while the Courts of Appeal are limited in their review of a denial of a new trial based on the weight of the evidence, under certain circumstances it is proper for the Courts of Appeal to review the District Courts' refusal to

set aside a verdict where an abuse of discretion is claimed. All of the other United States Circuit Courts of Appeal have entertained appeals based on the weight of the evidence or at least indicated that such appeals are reviewable where there is a claim that a District Court has abused its discretion in denying or granting a new trial based on the weight of the evidence. *Lowe v. E. I. DuPont de Nemours & Co.*, 802 F. 2d 310 (8th Cir. 1986); *Coffran v. Hitchcock Clinic Inc.*, 683 F. 2d 5 (1st Cir. 1982) *cert. den.* 459 U.S. 1087; *Hadra v. Herman Blum Consulting Engineers*, 632 F. 2d 1242 (5th Cir. 1980) *cert. den.* 451 U.S. 912; *Hanson v. Shell Oil Co.*, 541 F. 2d 1352 (9th Cir. 1976) *cert. den.* 429 U.S. 1074; *Warda v. Ford Motor Co.*, 509 F. 2d 213 (7th Cir. 1974); *Grove v. Dun & Bradstreet, Inc.*, 438 F. 2d 433 (3rd Cir. 1971) *cert. den.* 404 U.S. 898; *Duncan v. Duncan*, 377 F. 2d 49 (6th Cir. 1967) *cert. den.* 389 U.S. 913; *Norfolk Southern Ry. Co. v. Davis Frozen Foods*, 195 F. 2d 662 (4th Cir. 1952); *Locke v. Atchison T. & S. F. Ry. Co.*, 309 F. 2d 811 (10th Cir. 1962).

The Second Circuit's refusal to entertain Petitioner's appeal on this issue therefore departs from the law of the United States and has deprived Petitioner of a meaningful opportunity to have a valid claim of error reviewed on appeal. Petitioner's appeal on the issue should have been heard, especially given the District Court's failure to properly charge the jury and its failure to exclude evidence and argument concerning the similar incident, all of which was highly prejudicial to Petitioner's case.

CONCLUSION

In conclusion the Supreme Court of the United States should grant Petitioner's petition for Writ of Certiorari to the Second Circuit. The Second Circuit and the District Court have totally overlooked or misapprehended Petitioner's claim of malpractice based on Dr. Wargo's failure to communicate his concerns with a responsible person. There is no genuine issue of fact that Respondent had such a duty and failed to perform it. However, the District Court and Second Circuit focused solely on the issue of misdiagnosis and erroneously refused Petitioner's request for directed verdict or a new trial to which he was entitled given the undisputed and overwhelming evidence. Finally, the Second Circuit has departed from the other Circuit Courts of Appeal in refusing to review the issue of whether or not the District Court abused its discretion in denying a new trial where the evidence was overwhelmingly in Petitioner's favor.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Thirteenth day of October one thousand nine hundred and eighty-eight.

Present: HONORABLE J. EDWARD LUMBARD,
HONORABLE JON O. NEWMAN,
HONORABLE AMALYA L. KEARSE,
Circuit Judges.

88-7420

ERIC KRIVANEK,
Plaintiff-Appellant,

v.

MAD RIVER VALLEY HEALTH CENTER, INC.,
Defendant-Appellee.

Dec. 28, 1988
ISSUED AS MANDATE:

ORDER

(Filed October 13, 1988)

Eric Krivanek appeals from a judgment of the District Court for the District of Vermont (Franklin S. Billings, Jr., Judge) entered, after a jury trial, in favor of the defendant-appellee Mad River Valley Health Center, Inc. Krivanek brought suit in this diversity action for malpractice, alleging the negligent failure of Dr. Timothy J.

Wargo to diagnose Krivanek's condition as meningitis when he came to the Health Center on January 27, 1986, complaining of headache, vomiting, and back pain. Krivanek returned to the Center two days later, exhibiting far more serious symptoms, at which time Dr. Wargo transferred him to the Medical Center of Vermont at Burlington, where meningitis was diagnosed.

The evidence was conflicting as to whether Dr. Wargo's failure to diagnose meningitis based on the symptoms exhibited by the plaintiff on January 27 fell below the standard of due care. *See Hartnett v. Medical Center Hospital*, 146 Vt. 297, 503 A.2d 1134 (1985). Judge Billings properly left this issue to the jury and did not err in refusing to set aside the jury's verdict.

The charge, read as a whole, did not require the jury to find that defendant was negligent in all of the respects alleged by the plaintiff. Furthermore, the exception taken to the charge by the plaintiff did not call the trial judge's attention to the allegedly improper use of the conjunction "and."

The contention that the verdict was against the weight of the evidence is not available for review in this Court, *see Compton v. Luckenbach Overseas Corp.*, 425 F.2d 1130, 1132 & n.2 (2d Cir.), *cert. denied*, 400 U.S. 916 (1970); *Portman v. American Home Products Corp.*, 201 F.2d 847, 848 (2d Cir. 1953), and in any event is without merit.

Finally, it was not error to permit an expert for the plaintiff to be cross-examined concerning a prior episode in which the expert had not diagnosed a case of meningitis.

The judgment of the District Court is affirmed.

/s/ J. Edward Lumbard
/s/ Jon O. Newman
/s/ Amalya L. Kearse
Circuit Judges.

N.B. This Summary Order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 12 day of December one thousand nine hundred and eighty-eight.

Present: HON. J. Edward Lumbard,
HON. Jon O. Newman,
HON. Amalya L. Kearse,

Eric Krivanek,

Plaintiff-Appellant,

V. 88-7420

Mad River Valley
Health Center, Inc.

Defendant-appellee.

(Filed December 12, 1988)

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellant, Eric Krivanek.

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is DENIED.

ELAINE B. GOLDSMITH
Clerk

/s/ Fred M. Cassidy
By: Fred M. Cassidy,
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12 day of December one thousand none hundred and eighty-eight.

Present: HONORABLE J. EDWARD LUMBARD,
HONORABLE JON O. NEWMAN,
HONORABLE AMALYA L. KEARSE,
Circuit Judges.

ERIC KRIVANEK,
Plaintiff-Appellant,

v. 88-7420

MAD RIVER VALLEY
HEALTH CENTER, INC.,
Defendant-Appellee.

ORDER

(Filed December 12, 1988)

The Order issued October 13, 1988, is amended on page 2, lines 16-17, by deleting "the expert" and substituting "an emergency room physician."

/s/ J. EDWARD LUMBARD
/s/ JON O. NEWMAN
/s/ AMALYA L. KEARSE
Circuit Judges.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Thirteenth day of October one thousand nine hundred and eighty-eight.

Present: HONORABLE J. EDWARD LUMBARD,
HONORABLE JON O. NEWMAN,
HONORABLE AMALYA L. KEARSE,
Circuit Judges.

ERIC KRIVANEK,
Plaintiff-Appellant,

v. 88-7420

MAD RIVER VALLEY HEALTH CENTER, INC.,
Defendant-Appellee.

ORDER

(Filed October 13, 1988)

Eric Krivanek appeals from a judgment of the District Court for the District of Vermont (Franklin S. Billings, Jr., Judge) entered, after a jury trial, in favor of the defendant-appellee Mad River Valley Health Center, Inc. Krivanek brought suit in this diversity action for malpractice, alleging the negligent failure of Dr. Timothy J. Wargo to diagnose Krivanek's condition as meningitis when he came to the Health Center on January 27, 1986,

complaining of headache, vomiting, and back pain. Krivanek returned to the Center two days later, exhibiting far more serious symptoms, at which time Dr. Wargo transferred him to the Medical Center of Vermont at Burlington, where meningitis was diagnosed.

The evidence was conflicting as to whether Dr. Wargo's failure to diagnose meningitis based on the symptoms exhibited by the plaintiff on January 27 fell below the standard of due care. *See Hartnett v. Medical Center Hospital*, 146 Vt. 297, 503 A.2d 1134 (1985). Judge Billings properly left this issue to the jury and did not err in refusing to set aside the jury's verdict.

The charge, read as a whole, did not require the jury to find that defendant was negligent in all of the respects alleged by the plaintiff. Furthermore, the exception taken to the charge by the plaintiff did not call the trial judge's attention to the allegedly improper use of the conjunction "and."

The contention that the verdict was against the weight of the evidence is not available for review in this Court, *see Compton v. Luckenbach Overseas Corp.*, 425 F.2d 1130, 1132 & n.2 (2d Cir.), *cert. denied*, 400 U.S. 916 (1970); *Portman v. American Home Products Corp.*, 201 F.2d 847, 848 (2d Cir. 1953), and in any event is without merit.

Finally, it was not error to permit an expert for the plaintiff to be cross-examined concerning a prior episode in which the expert had not diagnosed a case of meningitis.

The judgment of the District Court is affirmed.

/s/ J. Edward Lumbard
/s/ Jon O. Newman
/s/ Amalya L. Kearse
Circuit Judges.

N.B. This Summary Order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERIC KRIVANEK	:	
v.	:	
GREEN MOUNTAIN VALLEY SCHOOL, and MAD RIVER VALLEY HEALTH CENTER, INC.	:	Civil Action No. 86-299

REVISED JUDGMENT

(Filed April 20, 1988)

This action was tried by jury with a verdict returned on February 22, 1988.

IT IS ORDERED that defendant Mad River Valley Health Center, Inc., is not liable as the plaintiff has alleged in his complaint.

IT IS FURTHER ORDERED that based on stipulation of the parties, plaintiff's complaint against defendant Green Mountain Valley School, Inc., is hereby dismissed with prejudice and that Green Mountian Valley School's cross-claim against defendant Mad River Valley Health Center, Inc., is also dismissed with prejudice.

SO ORDERED.

Dated at Rutland in the District of Vermont this 20th day of April, 1988.

/s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERIC KRIVANEK	:	
v.	:	
GREEN MOUNTAIN VALLEY SCHOOL, and MAD RIVER VALLEY HEALTH CENTER, INC.	:	Civil Action No. 86-299

ORDER

(Filed March 17, 1988)

By motion filed March 7, 1988, plaintiff Eric Krivanek moves for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50, or in the alternative, for new trial pursuant to Fed. R. Civ. P. 59(a). Defendant opposes these motions.

Based on the evidence presented at trial and controlling case law, the Court finds a genuine issue of fact existed regarding defendant's negligence. The jury was properly charged on the question of negligence and the verdict was not against the weight of the evidence. The Court finds that defendant's counsel's examination of plaintiff's expert witness, regarding his knowledge of meningitis cases at the Medical Center Hospital of Vermont, was properly allowed and that reference to this testimony in defendant's counsel's closing argument was neither misconduct nor prejudicial. Finally, the jury's request that the Court re-read its charge on burden of proof and preponderance of evidence does not indicate that the jury misunderstood the charge when it rendered

its verdict. For these reasons, plaintiffs motions are DENIED.

SO ORDERED.

Dated at Rutland in the District of Vermont this 16 day of March.

/s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
U.S. District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF
Vermont

Eric Krivanek

V.

Mad River Valley
Health Center, Inc.

CASE
NUMBER: 86-299

JUDGMENT IN A CIVIL CASE

(Filed March 1, 1988)

[x] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant Mad River Valley Health Center, Inc., is not liable as the plaintiff has alleged in his complaint.

March 1, 1988

Date

/s/ LEONARD N. LAFAYETTE

Clerk

/s/ C. BURBANK

(By) Deputy Clerk

(2)

No. 88-1306

Supreme Court, U.S.
FILED
MAR 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

ERIC KRIVANEK,

Petitioner,

v.

MAD RIVER VALLEY HEALTH CENTER, INC.,

Respondent.

BRIEF IN OPPOSITION

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198pp

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JURISDICTION

This action was originally commenced by the Petitioner in the United States District Court for the District of Vermont. Jurisdiction there was founded on diversity of citizenship, 28 U.S.C. § 1332. Judgment was entered on a jury verdict in favor of Respondent. Petitioner's Motion for Judgment Notwitstanding the Verdict or for New Trial was denied, and Petitioner timely appealed to the Second Circuit Court of Appeals. The Second Circuit affirmed the judgment of the district court by summary order entered October 13, 1988. Petitioner's Petition for Rehearing was denied by order entered December 12, 1988. This order issued as mandate December 28, 1988.

On February 4, 1989, Petitioner filed his Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. The jurisdiction of this Court to review cases in the courts of appeals by writ of certiorari is granted by 28 U.S.C. § 1254(1).

———o———

CONSTITUTIONAL PROVISIONS INVOLVED

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

U.S. Const. amend. VII.

———o———

STATEMENT OF THE CASE

This is an action claiming medical malpractice. After ten days of trial, the jury returned a verdict for the Respondent Health Center. The Court, the Honorable Franklin S. Billings, Jr., ruled the verdict was not against the weight of the evidence and denied Petitioner's Post-Judgment Motion. (Petition at 10A.) The Judgment was affirmed by the United States Court of Appeals for the Second Circuit. Petitioner seeks review by Writ of Certiorari. The issue presented is whether the court of appeals had authority to review the denial of the Motion for New Trial and whether it correctly decided the motion was without merit.

Petitioner's Statement of the Case makes several assertions which are misleading or unsupported by the record. Respondent will therefore restate the case as well as point out some of the material errors in Petitioner's Statement. This detail is included because of the request that this Court review the weight of the evidence.

Facts

Respondent Mad River Valley Health Center, Inc. is a family health clinic in the Town of Warren, Vermont. Warren is a rural community in north central Vermont; the Health Center serves a population of approximately 2,500 to 3,000. (IV Tr. 3-4.) On Monday, January 27, 1986, Timothy J. Wargo, M.D. was one of two physicians practicing at the Center. (I Tr. 5.) Dr. Wargo is a Board Certified Family Practitioner. (I Tr. 3.) The Health Center also employed a nurse (Lorraine Wargo, R.N., Dr. Wargo's wife), a medical assistant and an office manager. (I Tr. 5-6.)

On January 27, 1986, at approximately four o'clock in the afternoon, the Petitioner came to the Health Center complaining of headache, vomiting and back pain. (VIII Tr. 5, 11; Ex. M.) Dr. Wargo interviewed Petitioner and conducted a physical exam. He thoroughly checked Petitioner's neck several times (I Tr. 48), including two specific tests for meningismus or nuchal rigidity. (I Tr. 15, 25; IV Tr. 2; V Tr. 2-5.) He found the neck to be supple with some muscle spasm, and the patient to be alert and cooperative. (I Tr. 68; Ex. M.) Dr. Wargo concluded Petitioner had the flu; he gave him some Tylenol and told him to come back if things did not change for the better. (I Tr. 49, 61; Ex. M.)

Petitioner did not return until 42 hours later on Wednesday, January 29, 1986, at approximately 10 o'clock in the morning. Dr. Wargo found a dramatic change in his condition; Petitioner was very confused, dehydrated and weak. (I Tr. 75.) It was obvious this was a medical emergency and Petitioner would need immediate hospitalization. (X Tr. 32-33.) After a full examination, Dr. Wargo transferred Petitioner by ambulance to the Medical Center Hospital of Vermont in Burlington. (I Tr. 84-85; Ex. M.) At Burlington, Petitioner was diagnosed as having meningitis.

Claims of the Parties

Petitioner claims the course of his illness would have been less severe if it had been diagnosed and treated as meningitis earlier. Petitioner claims Dr. Wargo and the Health Center were negligent in failing to properly diagnose, treat and supervise Petitioner during the onset of his illness. (Petitioner's Request for Jury Instructions, ¶ 1.)

Respondent Health Center denied any negligence and offered expert testimony that Dr. Wargo acted as a reasonably skillful, careful and prudent physician in diagnosing and treating Petitioner for influenza on Monday, January 27, 1986.

Expert Testimony

In its early stages, meningitis cannot be distinguished from any other illness. (II Tr. 58, 66.) The critical clinical signs are confusion and a form of neck stiffness known as nuchal rigidity. (I Tr. 15.) There are specific ways to test for nuchal rigidity known as Brudzinski's test and Kernig's test. (I Tr. 15, 25-26.) Most people with obvious meningitis have board-like stiffness of the neck: "You put your hands on their head and when they're lying on their back, and if you're strong enough to lift them up, their entire bodies from the hips up, off the table." (II Tr. 49-50.) Nuchal rigidity is distinct from stiffness of the neck caused by muscle spasms. (I Tr. 24, 26-27.) There are no degrees or grades of nuchal rigidity; it is either present or not present. (I Tr. 33.)

When nuchal rigidity and/or confusion are present along with nonspecific signs in common with other illnesses, a diagnostic test known as lumbar puncture (spinal tap) is indicated. (II Tr. 14.) The diagnosis of meningitis cannot be made without a spinal tap. (I Tr. 23.) There are detriments and risks associated with the lumbar puncture, including a small risk of serious complications or death, which suggest caution in its use. (XII Tr. 12-13.)

Dr. Robert C. Orr was qualified as an expert witness for the Respondent Health Center. Dr. Orr is a Board Certified Family Practitioner who has practiced in Brattleboro, Vermont, for 16½ years. (XII Tr. 2-4.) In his opin-

ion, Dr. Wargo did not deviate from the standards of family practice in Vermont in his treatment of Petitioner on January 27, 1986. Dr. Wargo's evaluation and the documentation were adequate; his assessment was reasonable, and his plan was appropriate. A spinal tap was not indicated because there was nothing to make one suspicious of meningitis, *i.e.*, no stiff neck, confusion or seizures. (XII Tr. 7-8.) Before considering doing a spinal tap, one would have to have had absolute rigidity or confusion or seizures. (XII Tr. 18, 21.)

Dr. Orr was also of the opinion that Dr. Wargo did not deviate from the standards of family practice in Vermont on January 29, 1986. There is good documentation of the major change in the patient's condition, a thorough evaluation, and plans for expeditious transfer of the patient to a medical facility that could care for Petitioner's problem. (XII Tr. 11.)

Donald N. MacKay, M.D. was also qualified as an expert witness for the Respondent Health Center. Dr. MacKay is an Associate Professor of Clinical Medicine at the Dartmouth Medical School, specializing in infectious diseases. (II Tr. 6-7.) Dr. Wargo's examination of Petitioner on January 27, 1986 was proper. (II Tr. 13.) A spinal tap was not indicated. (II Tr. 13-14.)

> "The two things that we, as doctors, do observe as suspect and do a spinal tap or have one done where it could be is if a person has a stiff neck or has some signs of disfunction in the central nervous system such as confusion, stupor or in its most extreme, coma. And none of those are present. He's described as being alert, cooperative, neurologically intact, has a supple neck. In other words, the neck was not stiff."
>
> (II Tr. 14.)

The medication Dr. Wargo prescribed was proper. (II Tr. 15.) The advice Dr. Wargo gave Petitioner, "[return to clinic] if not better," was proper medical advice. (II Tr. 16-17.) The diagnosis of flu was certainly a reasonable one. (II Tr. 18.)

Dr. MacKay testified that if Dr. Wargo missed the diagnosis of meningitis on Monday, "so would have everyone else. . . . [H]e had no reason to make the diagnosis on Monday." (II Tr. 95.)

Based on Petitioner's condition on Wednesday, January 29th, Dr. MacKay believed physicians would differ in their opinion on whether to perform a spinal tap. Petitioner's symptoms could have been due to a brain abscess with intercranial pressure, and a lumbar puncture could cause death. (II Tr. 21-22.) Dr. Wargo's office was not equipped to do a spinal tap. He did the appropriate thing by sending Petitioner to a place where a spinal tap could be performed and monitored afterwards. (II Tr. 22.)

Dr. MacKay concluded that Dr. Wargo's treatment did not deviate in any way from the normal and acceptable standards applicable to a family practitioner in the State of Vermont. (II Tr. 20-21, 23-24.)

Petitioner's Statement of the Case

Throughout the Petition, it is stated that Dr. Wargo "suspected" Petitioner had meningitis. This is only partly true. Dr. Wargo had no reason to believe Petitioner had meningitis on Monday, January 27. He suspected it only in the sense that a competent physician, presented with a patient with Petitioner's symptoms, takes steps to rule out the possibility of meningitis. (I Tr. 49-

51; II Tr. 57-58, 60-61.) Dr. Wargo's examination, including the Brudzinski and Kernig tests, ruled out meningitis on Monday. (I Tr. 51; IV Tr. 2; V Tr. 2-5.)

Petitioner also claims Dr. Wargo "admitted" that he "mistakenly" believed there had to be board-like stiffness to diagnose meningitis. (*E.g.* Petition at 19.) There is no basis for this assertion that Dr. Wargo admitted a mistake. To the contrary, Dr. Wargo testified that the stiffness required to diagnose meningitis is distinct from muscle spasm. (I Tr. 24.) If there is any degree of stiffness, meaning nuchal rigidity, then meningitis should be suspected:

> "Q . . . [H]ow much stiffness has to be present to make you suspect that you've got meningitis as opposed to just your regular old garden variety stiff neck?
>
> A Okay. Again, I have to be very clear on what you mean by stiffness. . . .
>
> Q Enough to make you concerned about meningitis as a physician.
>
> A Okay. If it's just muscle spasm, doesn't make it. If there's any degree of stiffness, meaning nuchal rigidity, then I suspect the diagnosis."
>
> (I Tr. 24.)

Petitioner has not referred to any testimony in the record to support the proposition that muscle spasm is a sign of "developing nuchal rigidity," much less any testimony that Dr. Wargo admitted this "fact."

Dr. Wargo testified specifically that Petitioner probably did *not* have meningitis on Monday, January 27, 1986. (I Tr. 92.) The Health Center's experts supported Dr. Wargo's view that muscle spasm is distinct from nuchal rigidity. Dr. MacKay did not agree, even in retrospect,

that the muscle spasms on Monday were the start of rigidity on Wednesday. (II Tr. 92-93.)

Petitioner's Statement of the Case, unlike his presentation in the Court of Appeals, focuses on an alleged failure to communicate with Petitioner's school. But when Petitioner urged at the trial level that the charge should have specified "about the failure of the physician at the clinic to communicate with the school," the trial judge stated that he had used the word "monitor" in the charge, and that anything more specific would be improper comment on the facts. (V Tr. 49.)

The Petition also asserts erroneously that it was the unanimous opinion of the experts that Petitioner's parents or the school should have been notified of his condition. On January 27, 1986, Petitioner was nearly 18 years of age. Dr. Wargo had ruled out meningitis and believed he had the flu. As noted above, Dr. MacKay specifically testified that the advice given Petitioner, "[return to clinic] if not better," was proper medical advice. (II Tr. 16-17.) Supervision would have been required only "if he were a lot sicker than" he appeared on January 27. (II Tr. 84.)

Cross-examination of Petitioner's Expert

Petitioner's expert testified that he would have done a lumbar puncture in this case, even without a positive Kernig or Brudzinski test and without signs of confusion, based solely on the symptoms of fever, intense headache, back pain and vomiting. (III Tr. 41, 47.) He bolstered this opinion by references to alleged practices at the Medical Center Hospital of Vermont:

> "I can't emphasize enough how important we feel it is to establish the diagnosis as rapidly as possible in these types of situations. We now stress in our emergency room that when meningitis is suspected, an L.P. [be] done immediately. And hopefully within 30 minutes of that patient is receiving antibiotics."
>
> (III Tr. 57.)

On cross-examination, Respondent sought to test this opinion and show the true difficulty of diagnosis by reference to a case in which a lumbar puncture was not performed on a student who came to the expert's emergency room complaining of headache, and who later died of meningitis. (III Tr. 92.) When Petitioner objected to this offer to show that "even in the best of medical institutions . . . they can miss the diagnosis," the court ruled: "This is good cross-examination. We'll allow it." (III Tr. 91.)

Post-Judgment Motion

On March 17, 1988, District Judge Billings denied Petitioner's Post-Judgment Motion, stating:

> "Based on the evidence presented at trial and controlling case law, the court finds a genuine issue of fact existed regarding defendant's negligence. The jury was properly charged on the question of negligence and the verdict was not against the weight of the evidence. The court finds that defendant's counsel's examination of plaintiff's expert witness, regarding his knowledge of meningitis cases at the Medical Center Hospital of Vermont, was properly allowed and that reference to this testimony and defendant's counsel's closing argument was neither misconduct nor prejudicial. . . ."
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> (Petition at 10A.)

Appeal to the United States Court of Appeals for the Second Circuit

On appeal to the United States Court of Appeals for the Second Circuit, Judges Lumbard, Newman and Kearse reviewed the sufficiency of the evidence to support the verdict, claimed errors in the charge, and other alleged trial errors. In a summary order, the court found the evidence was conflicting as to whether Dr. Wargo's failure to diagnose meningitis fell below the standard of due care. The court ruled that Judge Billings properly left this issue to the jury and did not err in refusing to set aside the jury's verdict. (Petition at 2A.) The court held the charge, read as a whole, was proper, and that Petitioner's specific claims of error regarding the charge were not properly preserved for review. (*Id.*) The Court found no error in the cross-examination of Petitioner's expert. (*Id.*) Finally, the court ruled that the denial of the motion for new trial was not reviewable; and in any event, that the motion was without merit:

> "The contention that the verdict was against the weight of the evidence is not available for review in this Court . . . and in any event is without merit."
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> (Petition at 2A; citations omitted.)

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SUMMARY OF ARGUMENT

This Court should not grant certiorari merely for the purpose of examining a detailed factual record to determine whether Petitioner has received proper appellate review.

The jurisprudence in the lower courts concerning the reviewability of motions for new trial is not fully developed. The statement of the court below that such motions are unreviewable is consistent with the precedent of this Court. Any conflict among the circuits is more apparent than real, and it is premature for this Court to reexamine the question.

In any event, this case does not squarely present the legal question. The court of appeals ruled on the facts that Petitioner's motion for new trial was without merit.

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ARGUMENT

I. THE PETITION RAISES NO SPECIAL OR IMPORTANT REASON FOR GRANTING CERTIORARI. NO QUESTION OF LAW IS INVOLVED, BUT MERELY ROUTINE APPELLATE REVIEW BY THE COURT OF APPEALS OF A DETAILED RECORD.

A review on writ of certiorari will be granted only when there are "special and important reasons therefor." Sup.Ct.R. 17.1. The decision below represents the routine appellate work of the court of appeals. No important question of law is involved. The court of appeals reviewed an extensive record to determine whether the evidence supported the verdict, whether the charge as a whole was adequate, whether a new trial should have been granted, and whether any other alleged trial error affected the substantial rights of the parties. (See Summary Order; Petition at 1A-3A.) Resolution of these questions is important only to the litigants themselves, and no others. Petitioner is seeking merely a second level of appellate

review. But this is not and cannot be the current function of the writ of certiorari. Petitioner has advanced no "special or important" reason for this Court to become embroiled in the detailed facts of this complex medical malpractice case.

II. THIS CASE DOES NOT PRESENT A CONFLICT AMONG THE COURTS OF APPEALS IN A PROPER FORM OR AT AN APPROPRIATE TIME FOR THIS COURT'S REVIEW.

The only matter raised in the Petition which colorably would warrant this Court's consideration is Petitioner's assertion that the Second Circuit Court of Appeals' refusal to review the denial of the motion for new trial is in conflict with the decisions of other federal courts of appeals. (Petition at 21-22.) Sup. Ct. R. 17.1.(a).

In 1940 this Court stated categorically: "Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 248 (1940). *See also Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481 (1932) ("The rule precludes likewise a review of such action by a circuit court of appeals.").

Judge Learned Hand elaborated for the Second Circuit Court of Appeals in 1953 that "it is too well established to justify discussion" that "there may be errors that are not reviewable at all, and among those that are not are erroneous orders granting or denying motions to set aside verdicts on the ground that they are against the weight of the evidence." *Portman v. American Home Products Corp.*, 201 F.2d 847, 848 (2d Cir. 1953). Based on this Court's controlling precedents, the Second Circuit

Court of Appeals has consistently refused to review the denial of a motion to set aside a verdict on the grounds that it is against the weight of the evidence. *E.g., Bauer v. Raymark Industries, Inc.*, 849 F.2d 790 (2d Cir. 1988); *Newmont Mines, Ltd. v. Hanover Insurance Co.*, 784 F.2d 127, 133 (2d Cir. 1986). Thus, Judge Lumbard, Newman and Kearse's Summary Order below ruled that Petitioner's "contention that the verdict was against the weight of the evidence is not available for review in this Court. . . ." (Petition at 7A.)

One leading commentator has observed that a "blizzard of dicta" have suggested that some other courts of appeals are willing to review denials of new trials sought on the ground that the verdict is against the weight of the evidence. 11 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2819 at 121-22 (1973). However, the conflict among circuits is more apparent than real. In 1973 Professors Wright and Miller found that actual cases of reversal of a trial judge's determination that the verdict was not against the weight of the evidence "are extremely few." 11 *Wright & Miller, supra*, § 2819 at 123 (citing a 1959 decision of the Fifth Circuit). Since initial publication of Wright and Miller's critique, only the Fifth Circuit, apparently, has persisted and on one occasion reversed the denial of a refusal to grant a new trial where the verdict was asserted to be against the weight of the evidence. *Urti v. Transport Commercial Corp.*, 479 F.2d 766, 769 (5th Cir. 1973) (test is whether there is "absolute absence of evidence to support the jury's verdict."). *See* 11 C. Wright, A. Miller & F. Elliott, *Federal Practice & Procedure*, § 2819 n60 (Supp. 1988).

None of the authority cited by Petitioner as evidencing conflicting decisions of the circuit courts of appeals is a reversal of the denial of a motion for new trial. (Petition at 22.) Most of the cited cases involve review of the *grant* of a motion for new trial, which presents entirely different constitutional questions. 11 *Wright & Miller, supra*, § 2819 at 125-27.

As Wright and Miller point out, there are constitutional problems with appellate review of the weight of the evidence:

> "To allow appellate review of the denial of the new trial motion would mean that the verdict could be set aside solely by judges who were not present at the trial even though the trial judge has found that the verdict is not against the clear weight of the evidence. This would be a complete reversal of common law practice and is very difficult to reconcile with the Seventh Amendment.
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> Thus the courts that have said, by repeated dicta, that there are some circumstances in which they might reverse the denial of a new trial have given legitimacy to a doctrine of doubtful constitutionality. Its utility is even more dubious.
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> *Wright & Miller, supra*, § 2819 at 125.

Since 1973, at least one circuit which had earlier intimated in dictum that denials are reviewable has recognized the constitutional dimensions of the problem. The Eighth Circuit has requested full briefing of the constitutional issue in connection with any future requests for appellate review. *Green v. American Airlines, Inc.*, 804 F.2d 453, 454-56 (8th Cir. 1986).

In short, there is no recent or substantial authority in any court of appeals which, fully informed as to the

seventh amendment issue, has reversed the denial of a motion to set aside a verdict as against the weight of the evidence. Until and unless such authority develops, it is premature for this Court to address the issue.

Further, even if this Court is inclined to resolve a blizzard of confusting dicta among the circuits, this case is not the proper vehicle to do so. Here, the denial of the motion for new trial was affirmed not merely on the basis of its unreviewability. Judges Lumbard, Newman and Kearse also observed: "The contention that the verdict was against the weight of the evidence . . . in any event is without merit." (Petition at 7A.) This ruling in itself is unreviewable. *Fairmount Glass Works, supra,* 287 U.S. at 481. It also renders the constitutional issue moot.

In summary, the Second Circuit Court of Appeals correctly decided that it does not have the power to review the denial of a motion to set aside a jury's verdict on the ground that it is against the weight of the evidence. Until any contrary jurisprudence in other circuits develops more fully, it is premature for this Court to address the seventh amendment questions which this case does not squarely present.

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CONCLUSION

There is substantial evidence to support the jury verdict that Dr. Wargo committed no malpractice. After a ten day trial and full appellate review, this litigation should end. The case does not present any special or important legal issue appropriate for this Court's review.

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be DENIED.

Respectfully submitted,

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